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## The History of Electronic Mail in Litigation

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## ARTICLES

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# THE HISTORY OF ELECTRONIC MAIL IN LITIGATION

**Samuel A. Thumma<sup>†</sup> and Darrel S. Jackson<sup>††</sup>**

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## I. INTRODUCTION

Electronic mail ("e-mail") usage has exploded over the past few years and will further expand in the future. Estimates suggest that the number of e-mail users doubles approximately every two years. For 1994 through 2002, conservative estimates<sup>1</sup> show the following number of e-mail users in the United States:

Year	Estimated Number of E-Mail Users in the United States
1994	10,000,000
1996	20,000,000
1998	47,000,000
2002	105,000,000 (projected)

Moreover, the number of e-mail users abroad may be much larger than the number of e-mail users in the United States. In short, e-mail use is ubiquitous.

Along with the number of e-mail users, the frequency of e-mail use is staggering. Estimates of the total number of e-mail messages sent and projected to be sent each day in the United States<sup>2</sup> are at amazing levels:

Year	Estimated Number of E-Mail Messages Sent Daily in the United States
1994	100,000,000
1998	500,000,000
2002	1,500,000,000 (projected)

Taken together, the estimates of e-mail users and usage suggest that an average e-mail user sends from 1,500 to more than nearly 4,000 messages per year,<sup>3</sup> or from four to eleven e-mail messages per day. These estimates yield a total of 23,500,000,000,000 (23.5

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1. See David E. Kalish, *Employers' E-mail Monitoring Surges*, ARIZ. REPUBLIC, Mar. 5, 1999, at E1 (citing Forrester Research Inc. estimates for 1994, 1998 and 2002); Anthony J. Dreyer, Note, *When the Postman Beeps Twice: The Admissibility of Electronic Mail Under the Business Records Exception of the Federal Rules of Evidence*, 64 FORDHAM L. REV. 2285, 2288 (1996) (1996 estimates).

2. See Kalish, *supra* note 1.

3. See Kalish, *supra* note 1; Dreyer, *supra* note 1, at 2288.

quadrillion) e-mail messages sent in 1998 in the United States alone, with the number increasing substantially each year. And again, international use may be much larger.

E-mail usage is particularly prevalent in the workplace. In 1996, nine of ten employers with more than 1,000 employees had e-mail systems.<sup>4</sup> Applying average usage estimates, such companies generate an enormous number of e-mail messages. A company with 1,000 employees who each send eight e-mail messages per workday would produce two million messages per year. Even smaller companies with e-mail systems produce a large number of messages. Applying average usage estimates, a company with 100 employees who each send eight e-mail messages every workday would produce 200,000 messages per year.

Accompanying the increasingly pervasive use of e-mail is the common misperception that e-mail is “informal, confidential and not permanent.”<sup>5</sup> To the contrary, e-mail may be “obtained, examined, and saved by parties unknown”<sup>6</sup> to the sender and forwarded to the world via the Internet. Moreover, “e-mail has greater potential for permanence than most other forms of communications, as both senders and recipients are able to save the messages on disk, tape, or hard copy.”<sup>7</sup> And “the more important, spicy or inflammatory . . . the message, the more likely it will be retained.”<sup>8</sup>

Accordingly, misperceptions about e-mail, coupled with human nature in general, result in some astonishing (as well as shocking and appalling) e-mail messages, both in the workplace and elsewhere. Not surprisingly, attorneys have discovered that e-mail messages can be particularly relevant and instructive evidence in litigation, and can be a gold mine, or a nightmare, depending upon the party an attorney represents.<sup>9</sup> As a result, and particularly in recent years, there has been a dramatic increase in the number of generally available judicial

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4. See Dreyer, *supra* note 1, at 2288.

5. R. Scott Simon, *Searching for Confidentiality in Cyberspace: Responsible Use of E-Mail for Attorney-Client Communications*, 20 U. HAW. L. REV. 527, 533 (1998) (citing Samuel A. Thumma & Patricia A. Hubbard, *E-Mail Can Deliver Legal Problems*, ARIZ. BUS. GAZETTE, Oct. 17, 1996, at 15).

6. *Id.*

7. *Id.* at 533-34 (citing Samuel A. Thumma & Patricia A. Hubbard, *E-Mail Can Deliver Legal Problems*, ARIZ. BUS. GAZETTE, Oct. 17, 1996 at 15).

8. *Id.* at 534 n.32.

9. Moreover, the use of inflammatory e-mail in legal proceedings is not limited to formal litigation. See Jeremy D. Mishkin, *The Paper It's Written On*, LITIG., Summer 1999, at 17-18 (noting “striking examples of the impact of e-mail” evidenced by the Iran-Contra scandal and by the Senate impeachment trial of President Clinton).

decisions in which e-mail has played a significant role in resolving the issue (the number of "e-mail cases").<sup>10</sup>

This article reviews the history of e-mail in litigation. The article first discusses the general evolution of e-mail in litigation, which like e-mail use itself, has expanded drastically in recent years.<sup>11</sup> The article next discusses the general subject matter areas of e-mail cases decided in recent years, with particular focus on e-mail cases decided in 1997, 1998 and the first six months of 1999.<sup>12</sup> Included in that discussion are highlights of particularly noteworthy recent cases and recurring issues involving e-mail in litigation. The article then concludes with some predictions for the future use of e-mail in litigation.<sup>13</sup> As the cases to date suggest, e-mail in litigation is already widely recognized, and future use will be limited solely by the imaginative uses that parties and counsel can identify, and that courts will allow.

## II. THE HISTORY OF E-MAIL IN LITIGATION

### A. *The Beginning*

The use of e-mail in litigation is a recent phenomenon. Prior to 1970, there were no generally available judicial decisions addressing e-mail. In 1970, the stage was set for the introduction of e-mail in litigation when the Supreme Court amended the definition of "documents" contained in the Federal Rules of Civil Procedure to include any "data compilations from which information can be obtained, translated, if necessary, by the [party responding to a request for production] through detection devices into reasonably usable form."<sup>14</sup> Because of that amendment, Federal Rule of Civil Procedure 34, which governs the production of documents, expressly "applies to electronic data compilations from which information can be obtained only with the use of detection devices," and a discovering party could require the responding party to translate electronically stored data into usable form.<sup>15</sup> Perhaps as a result, e-mail first began to appear in generally reported cases in the 1970s.

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10. In light of research restraints, the cases discussed in this article are limited to those that are generally available on electronic database research services.

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. FED. R. CIV. P. 34(a).

15. FED. R. CIV. P. 34 advisory committee's notes.

The first generally available judicial opinion to mention e-mail appeared in the 1972 Supreme Court decision *United States v. Midwest Video Corp.*, where the issue was the validity of a Federal Communications Commission ("FCC") restriction on certain cable television systems.<sup>16</sup> In a plurality opinion, the Court quoted an agency notice observing the promise that cable television offered for supplying ancillary services: "the expanding multichannel capacity of cable systems could be utilized to provide a variety of new communications services to homes and businesses within a community,' such as facsimile reproduction of documents, electronic mail delivery, and information retrieval."<sup>17</sup> Other than that parenthetical reference, however, *Midwest Video* had nothing to do with e-mail, instead addressing the regulation of cable television.

E-mail next appeared in a generally available judicial decision four years later in *Western Union International, Inc. v. FCC*.<sup>18</sup> The court in *Western Union* reversed an administrative decision that Western Union could lease and operate facilities to provide Mailgram services to Hawaii.<sup>19</sup> In coming to that conclusion, the court described how Western Union's Mailgram service depended on e-mail:

A mailgram . . . is essentially "electronic mail." The message is picked up from a customer by various means, including telephone, telex, over-the-counter and messenger. The mailgram is then transmitted over circuits to [Western Union's] computer switching center in Middletown, Virginia. There the computer routes the mailgram over circuits specifically dedicated to this particular service, to a preselected Post Office, where a postal employee takes the message from the teleprinter and puts it in the regular mails.<sup>20</sup>

Like *Midwest Video*, however, other than this parenthetical description, *Western Union* had little to do with e-mail.<sup>21</sup>

The first case where e-mail played a substantial role was decided five years later in 1981 and, ironically, involved the United States

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16. *United States v. Midwest Video Corp.*, 406 U.S. 649, 652-58 (1972).

17. *Id.* at 651 (quoting Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 419-20 (1968)).

18. *Western Union Int'l, Inc. v. FCC*, 544 F.2d 87 (2d Cir. 1976).

19. *Id.* at 88.

20. *Id.*

21. The question before the court in *Western Union* was the meaning of a statutory restriction regarding "international telegraph operations." The court found that the FCC improperly construed the statutory restriction. *See id.* at 89, 93.

Postal Service. *Governors of United States Postal Service v. United States Postal Rate Commission* arose out of a bulk computer-generated mail system.<sup>22</sup> Using that system, a computer sent electronic mail messages to “a specially equipped post office” and the messages then were “converted by a printer into hard copy” and delivered to the addressee.<sup>23</sup> The specific issue in *Governors* concerned the United States Postal Service’s “classification” of this bulk mail system. Ultimately, the court held that the United States Postal Service Rate Commission exceeded its authority by classifying the system “experimental” with a fixed termination date.<sup>24</sup> Following this rather mundane beginning, the number of e-mail cases slowly began to increase.

### B. The 1980s

A recent electronic database search located just twenty-eight generally available state and federal judicial decisions from 1981 (when *Governors* was decided) through 1989 that mentioned electronic mail.<sup>25</sup> These cases addressed a variety of topics. For the most part, e-mail was tangential to the issues in the underlying lawsuit or not part of the case at all. For example, in *Kessler Institute for Rehabilitation v. NLRB*, the court expressed its exasperation with the United States Postal Service, exclaiming that “[i]n this court, for example, postal delays so hindered the expeditious work of the judges that a sophisticated electronic mail system has been installed.”<sup>26</sup>

By contrast, in some cases from the 1980s, e-mail was at the core of the dispute. In *United States v. Western Electric Co.*, for example, the court held that the provision of e-mail services by regional telephone companies was an exception to the general prohibition against telephone companies being involved in activities implicating content manipulation.<sup>27</sup> Some other cases from the 1980s forecast the issues e-mail would implicate years later. In *White v. Westinghouse Electric Co.*, a plaintiff making an age discrimination claim submitted as evidence an e-mail purportedly referencing a supervisor’s

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22. *Governors of United States Postal Serv. v. United States Postal Rate Comm’n*, 654 F.2d 108 (D.C. Cir. 1981).

23. *Id.* at 110.

24. *See id.* at 117.

25. *See generally* Samuel A. Thumma & Darrel S. Jackson, *Electronic Mail in the Workplace: Litigation Trends for 1998* (visited Oct. 25, 1999) <<http://www.brownbain.com>> [hereinafter *Litigation Trends for 1998*].

26. *Kessler Inst. for Rehabilitation v. NLRB*, 669 F.2d 138, 141 n.4 (3d Cir. 1982).

27. *United States v. Western Electric Co.*, 690 F. Supp. 22, 24 (D.D.C. 1988).

preference for replacement employees that were “real up and coming younger managers and professionals.”<sup>28</sup> In *Bauman v. Presser*, another case from the mid-1980s, the court considered evidence of an e-mail survey sent to local unions to determine whether a contract proposal had been discussed.<sup>29</sup>

In another 1980s e-mail case, the court in *United States v. Wright* reversed an order suppressing evidence in a criminal case.<sup>30</sup> The *Wright* court found that a government agent’s affidavit provided probable cause for a search, in part by relating “the existence of a wire which permitted the transaction of activities between Utah and California sites by electronic mail.”<sup>31</sup> And in *Blum v. Commissioner*, the United States Tax Court noted that it would not accept for filing “electronic mail”, because such filing did not “conform with the Court’s Rules of Practice and Procedure as to form and style.”<sup>32</sup> Although small in number, these cases began to show just how useful, frequent and pervasive e-mail would become in litigation in subsequent years.

### C. The Early and Mid-1990s

The number of cases involving e-mail grew during the early and mid-1990s. In 1993, for example, there were twenty-nine generally available state and federal judicial decisions that mentioned e-mail.<sup>33</sup> Accordingly, there were more cases mentioning e-mail decided during 1993 than during the entire decade of the 1980s.

Along with this increase in number of generally available cases, there was an increase in the types of issues involving e-mail that were addressed during the early and mid-1990s. As a noteworthy example, in 1993, the United States Court of Appeals for the District of Columbia Circuit issued a decision that will have long-lasting implications. In *Armstrong v. Executive Office of the President*, the court considered claims by researchers and organizations that sought to prevent the deletion of e-mail created during the Reagan Administration.<sup>34</sup> The court held that e-mail records were entitled to the same protection as paper records under the Federal Records Act,

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28. *White v. Westinghouse Electric Co.*, 862 F.2d 56, 61 (3d Cir. 1988).

29. *Bauman v. Presser*, No. CIV.A.84-2699, 1984 WL 3255, at \*5 (D.D.C. Sept. 19, 1984).

30. *United States v. Wright*, 791 F.2d 133, 134 (10th Cir. 1986).

31. *Id.* at 134.

32. *Blum v. Commissioner*, 86 T.C. 1128, 1132 n.6 (1986) (construing electronic mail as “documents electronically transmitted by facsimile process or otherwise”).

33. See *Litigation Trends for 1998*, *supra* note 25.

34. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1277 (D.C. Cir. 1993).



and ordered preservation of e-mail records.<sup>35</sup>

E-mail also appeared with some frequency in the employment context.<sup>36</sup> For example, in *Aviles v. McKenzie*, the plaintiff lab technician relied upon his own e-mail messages reporting purportedly improper practices to support a claim that he was terminated for whistle blowing.<sup>37</sup> Those e-mail messages, together with other evidence, were sufficient for the court to deny the defendant employer's motion for summary judgment.<sup>38</sup>

E-mail appeared in an employment discrimination dispute in *Strauss v. Microsoft Corp.*<sup>39</sup> This was a Title VII dispute in which the plaintiff alleged that the supervisor sent "e-mail messages that were offensive to women."<sup>40</sup> The court denied defendant's motion to dismiss, finding that evidence of objectionable messages transmitted by e-mail, along with other improper comments by the supervisor, "could lead a reasonable jury to conclude that Microsoft's proffered reason is not the true reason for its failure to promote [the plaintiff]."<sup>41</sup> In 1994, the court denied a motion for summary judgment for similar reasons, noting that the supervisor sent purportedly offensive e-mail to another employee, who in turn forwarded those messages to the plaintiff.<sup>42</sup> And in a 1995 opinion, the court denied defendant's motion in limine to exclude e-mail at trial, rejecting defendant's characterization that certain graphic e-mail messages were "attempts at humor."<sup>43</sup>

Another employment case, this time decided in 1996, rejected an employee's claim that he was improperly terminated for using his employer's e-mail system. In *Smyth v. Pillsbury Co.*, the plaintiff alleged that his employer "assured its employees, including plaintiff, that e-mail communications could not be intercepted and used . . . as

35. *See id.* at 1285-87.

36. *See* Frank C. Morris, Jr., *E-Mail Communications: The Next Employment Law Nightmare*, CURRENT DEVS. IN EMPLOYMENT L. (ALI/ABA Course of Study, Santa Fe, N.M.), Dec. 7, 1995, at 571.

37. *Aviles v. McKenzie*, No. C-91-2013 DLJ, 1992 WL 715248, at \*2-3, \*10 (N.D. Cal. Mar. 17, 1992).

38. *See id.* at \*10.

39. *Strauss v. Microsoft Corp.*, 814 F. Supp. 1186 (S.D.N.Y. 1993); *see also Strauss v. Microsoft*, 856 F. Supp. 821 (S.D.N.Y. 1994) (denying summary judgement); *Strauss v. Microsoft Corp.*, 91 CIV. 5928, 1995 WL 326492 (S.D.N.Y. June 1, 1995) (denying motion in limine).

40. 814 F. Supp. at 1188-89; *see also id.* at 1189 n.3 & 1194 (summarizing content of e-mail messages).

41. *Id.* at 1194.

42. *See* 856 F. Supp. at 823.

43. *Strauss*, 1995 WL 326492, at \*4-\*5.

grounds for termination or reprimand.”<sup>44</sup> Pillsbury nevertheless terminated plaintiff for transmitting “what [Pillsbury] deemed to be inappropriate and unprofessional comments over [its] e-mail system.”<sup>45</sup> In granting defendant’s motion to dismiss, the *Smyth* court held that plaintiff did not have a reasonable expectation of privacy “in e-mail communications voluntarily made by [plaintiff] to his supervisor over the company e-mail system” and that no reasonable person “would consider the defendant’s interception of these communications to be a substantial and highly offensive invasion of [plaintiff’s] privacy.”<sup>46</sup> As a matter of law, the court held that plaintiff’s employer was at liberty to intercept employee e-mail. Thus, plaintiff’s termination, based on the content of the e-mail intercepted by the employer, was not contrary to state law.<sup>47</sup>

E-mail also appeared in the criminal context in the early and mid-1990s. In *Allen v. Oklahoma*, the defendant was accused of murdering his wife.<sup>48</sup> The defendant had maintained a sexual relationship with his secretary and revealed to her in e-mail messages “the most intimate sexual problems” in his marriage.<sup>49</sup> These e-mail messages were admitted as evidence at trial. After his conviction, the defendant appealed the admissibility of the e-mail messages, arguing that they were irrelevant.<sup>50</sup> Rejecting that claim, the state appellate court held that the trial court had properly admitted the e-mail messages as evidence to show motive, affirming the murder conviction.<sup>51</sup>

During the mid-1990s, litigants and courts alike were beginning to understand the burden of searching and producing e-mail. In *In re Brand Name Prescription Drugs Antitrust Litigation*, the plaintiffs’ request for production of documents would have required defendant CIBA-Geigy to produce “at least 30 million pages of e-mail data stored on its technical back-up tapes.”<sup>52</sup> In response, CIBA-Geigy

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44. *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 98 (E.D. Pa. 1996).

45. *Id.* at 98-99 (footnote omitted); *see also id.* at 98 n.1 (quoting some of the e-mail messages).

46. *Id.* at 101.

47. *See id.* at 101; *see also* Wendy R. Leibowitz, *E-Litigation: E-Mail Land Expands*, NAT’L L.J., July 19, 1999, at B8 (discussing *Smyth* and citing a report that 27% of companies “surveyed monitor employee e-mail”).

48. *Allen v. Oklahoma*, 862 P.2d 487 (Okla. Crim. App. 1993).

49. *Id.* at 491.

50. *See id.*

51. *See id.*

52. *In re Brand Name Prescription Drugs Antitrust Litigation*, No. 94-C-897, 1995 U.S. Dist. LEXIS 8281, at \*2 (N.D. Ill. June 15, 1995).

claimed that plaintiffs should pay "an estimated cost of \$50,000 to \$70,000 in compiling, formatting, searching and retrieving responsive e-mail" that CIBA-Geigy would incur in complying with the request for production.<sup>53</sup> In considering the issue, the court weighed competing interests:

On the one hand, it seems unfair to force a party to bear lofty expense attendant to creating a special computer program for extracting data responsive to a discovery request. On the other hand, if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk.<sup>54</sup>

Noting that other defendants produced e-mail without cost shifting, and that defendant CIBA-Geigy tacitly admitted that the software it selected increased the cost to search for and isolate responsive e-mail compared to other defendants, the court ordered CIBA-Geigy to produce the requested e-mail messages without shifting the cost to plaintiffs, stating that they "should not be forced to bear a burden caused by CIBA's choice of electronic storage."<sup>55</sup>

Along with discovery issues, courts in the early and mid-1990s began to consider evidentiary issues arising out of e-mail use in civil litigation. In affirming a trial court's decision, the Ninth Circuit Court of Appeals held that, unlike some other types of computer-generated information, e-mail messages did not come within the business records exception to the hearsay rule.<sup>56</sup> The court stated "E-mail is far less of a systematic business activity than a monthly inventory printout. E-mail is an ongoing electronic message and retrieval system whereas an electronic inventory recording system is a regular, systematic function of a bookkeeper prepared in the course of business."<sup>57</sup>

These early and mid-1990s cases involving e-mail were accompanied by a flurry of articles describing various uses, perils, pitfalls and difficulties of e-mail in litigation.<sup>58</sup> In many respects,

53. *Id.* at \*2-\*3.

54. *Id.* at \*5.

55. *Id.* at \*6-\*7.

56. *See* Monotype Corp. PLC v. International Typeface Corp., 43 F.3d 443 (9th Cir. 1994); *see also* FED. R. EVID. 803(6).

57. *Monotype* 43 F.3d at 450; *accord* Rick v. Toyota Indus. Equip. Co., No. 93-C-1331, 1994 WL 484633, at \*6 & nn.4-5 (N.D. Ill. Sept. 2, 1994) (finding e-mail inadmissible as business record under Fed. R. Evid. 803(6)). *But see* Dreyer, *supra* note 1 (arguing that e-mail messages should be admissible under the business record exception of Fed. R. Evid. 803(6)).

58. *See, e.g.,* Laurie Thomas Lee, *Watch Your E-Mail! Employee E-Mail Monitoring*

however, the early and mid-1990s e-mail cases merely set the stage for more recent use of e-mail messages in litigation. Rapidly increasing in frequency, the e-mail cases decided by 1995 provided a good predictor for the literal explosion of e-mail cases during the late 1990s, as well as the types of issues the courts in those cases would be asked to address.

### III. THE LATE 1990S

#### A. In General

In contrast to just twenty-eight cases discussing e-mail in the 1980s, and twenty-nine e-mail cases in 1993 alone, there were at least twenty-eight cases involving e-mail decided in *each quarter* of 1997, 1998 and the first six months of 1999. In total, there were 127 generally available e-mail cases decided during 1997, representing more than a four-fold increase from 1993.<sup>59</sup> In 1998, there were 150 generally available e-mail cases published, a twenty percent increase from 1997.<sup>60</sup> And 1999 should outpace 1998, with 106 reported cases

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and Privacy Law in the Age of the "Electronic Sweatshop," 28 J. MARSHALL L. REV. 139 (1994); *E-Hate Mail Draws Charge*, NAT'L L.J., Dec. 2, 1996, at A8 (describing federal indictment against former student for allegedly sending e-mail messages to 60 Asian students at the University of California at Irvine threatening to kill them, marking the first time "the government has prosecuted an alleged federal hate crime committed in cyberspace"); Heidi L. McNeil & Robert M. Kort, *Discovery of E-Mail and Other Computerized Information*, ARIZ. ATT'Y, Apr. 1995, at 16; Martha Middleton, *A Discovery: There May Be Gold in E-Mail*, NAT'L L.J., Sept. 20, 1993, at 1; Mark E. Staib, *Absence of Proper Guidelines for E-Mail Use Can Create Client Headaches During Discovery*, 21 LITIG. NEWS, July 1996, at 4; Vera Titunk, *Collecting Evidence in the Age of E-Mail*, AM. LAW. July/Aug. 1994, at 119; Michael Traynor, *E-Mail Authentication Is Key*, NAT'L L.J., Aug. 1, 1994, at B9.

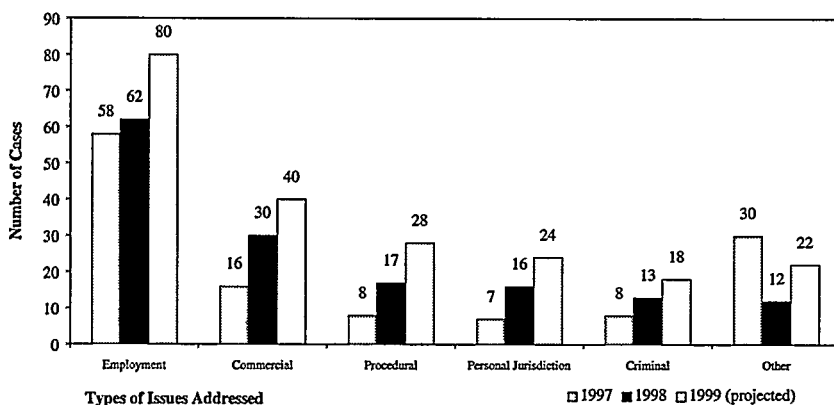
59. See generally Samuel A. Thumma, *Electronic Mail in the Workplace: Litigation Trends for 1997* (visited Oct. 25, 1999) <<http://www.brownbain.com>> (This 1997 year-in-review article is based on electronic database searches performed approximately one month after the end of each quarter in 1997. That research provides the basis for quarterly articles regarding e-mail in litigation, the 1997 year in review article and the 1997 cases in this article); Samuel A. Thumma, *What You Need To Know About Recent E-Mail Cases*, INTERNET NEWSL., June 1997, at 10; Samuel A. Thumma, *What you need to Know About Recent E-Mail Cases*, INTERNET NEWSL., Nov. 1997, at 7; Samuel A. Thumma, *Employment Dominates 3d Quarter E-Mail Cases*, INTERNET NEWSL., Dec. 1997, at 10; Samuel A. Thumma, *E-Mail Litigation Trends: 4th Quarter '97*, INTERNET NEWSL., Apr. 1998, at 11.

60. See generally *Litigation Trends for 1998*, *supra* note 25; Samuel A. Thumma, *E-Litigation Trends Continue in First Quarter Of 1998*, INTERNET NEWSL., June 1998, at 12; Samuel A. Thumma, *Employment Cases Still Bulk of E-Mail Litigation*, INTERNET NEWSL., Oct. 1998, at 12; Samuel A. Thumma & Darrel S. Jackson, *E-Mail Litigation Puts Companies on Alert*, INTERNET NEWSL., Dec. 1998, at 10; Samuel A. Thumma & Darrel S. Jackson, *4th Quarter Cases Show More Balance*, Mar. 1998, at 10 (These articles were prepared using the same methodology described *supra* note 59, and provide the basis for the 1998 cases in this article.). See also Wendy R. Leibowitz, *E-Litigation: E-Mail Land Expands*, NAT'L L.J., July 19, 1999, at B8 (discussing selected

in just the first six months of the year.<sup>61</sup> Accordingly, in less than two decades, the use of e-mail in litigation has evolved from mere mention in isolated cases to prominent consideration in deciding fifty cases each quarter.

Although the more than 375 e-mail cases decided from 1997 through the first six months of 1999 addressed a variety of issues in different subject matter areas, the issues involving e-mail in these cases can be categorized in six groups: employment issues, commercial law, procedural matters, personal jurisdiction issues, e-mail in the criminal law context, and miscellaneous issues. The number of cases in each of these categories, except for the miscellaneous issues category, increased throughout the late 1990s:

Number of E-Mail Cases by Category Decided in 1997, 1998 and 1999<sup>62</sup>



Viewed as a percentage of the total cases involving e-mail each year, the percentage of employment cases fell slightly during the late 1990s, with corresponding growth in most of the other categories:

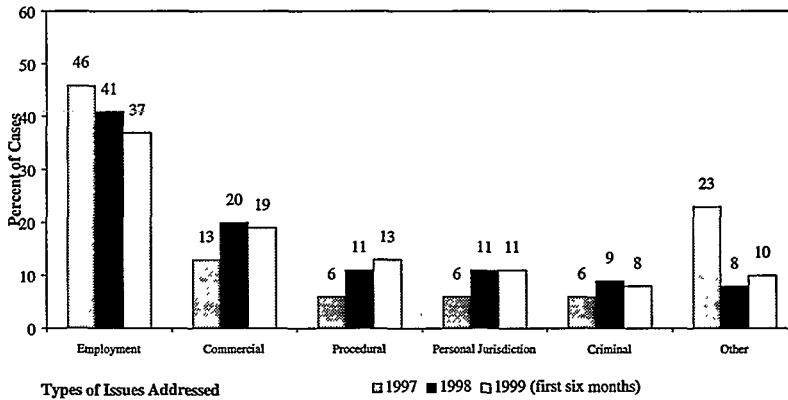
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e-mail cases from 1993 to 1999).

61. Cases on file with authors. *See also* forthcoming article discussing the most recent data concerning e-mail in litigation, which will be available online at <<http://www.brownbain.com>>.

62. Total cases for 1999 are projected by doubling the number of cases during the first six months of 1999.

Percentage of E-Mail Cases by Category Decided in 1997, 1998 and 1999 (first six months)



As illustrated, issues involving e-mail arise most often in the employment context. The number of employment e-mail cases was about twice as large as any other category throughout the late 1990s. As a percent of the total, employment cases represented almost half of all cases involving e-mail during 1997, and while decreasing in the next two years, nevertheless represented more than one third of all e-mail cases decided in the first six months of 1999.

Apart from the employment cases, the number and percentage of cases involving e-mail in commercial litigation is growing. From 1997 to 1999, the number of e-mail cases arising in the commercial context are projected to more than double. During that same time period, the percentage of e-mail cases arising in the commercial context increased from thirteen percent to nearly twenty percent of all e-mail cases.

The number of e-mail cases addressing procedural issues doubled from 1997 to 1998, accounting for more than ten percent of all 1998 e-mail cases. If this trend continues, the number of procedural cases in 1999 will increase by 65 percent over the number of such cases in 1998. Along with procedural issues, personal jurisdiction issues—raised when contacts with a forum occurred via e-mail or Internet activity—can be particularly troublesome for courts,<sup>63</sup> and are arising more frequently. From 1997 to 1998, the number of personal jurisdiction e-mail cases more than doubled and, in 1998, accounted for one out of every ten e-mail cases. That

63. See discussion *infra* Part III.E.

upward trend continued into 1999, with a projected fifty percent increase in personal jurisdiction cases when compared to 1998.

The final subject matter category, criminal cases, also showed a substantial increase. Comparing 1997 to 1998, e-mail cases in the criminal context increased fifty percent, accounting for one out of every ten 1998 e-mail cases. The number of criminal cases for 1999 is projected to more than double the number of cases in 1997.

Examining these subject matter categories separately reveals some clear trends in the e-mail cases decided in the late 1990s, and may provide some guidance as to how e-mail will be used in litigation in the future.

### *B. Employment Cases*

Disgruntled employees have discovered the force with which e-mail can be used in litigation to prove impermissible and actionable employment practices. Predictably, numerous cases considered allegedly harassing e-mail messages, which were sometimes graphic,<sup>64</sup> physically threatening<sup>65</sup> or retaliatory.<sup>66</sup> Frequently,

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64. See *McNeel v. Public Serv. Co.*, No. 96-1280, 1997 WL 383355, at \*1 (10th Cir. July 11, 1997) (noting that plaintiff "was suspended for one day following his dissemination of an offensive e-mail message containing religious and sexual comments about his supervisor"); *James v. Medical Control, Inc.*, 29 F. Supp. 2d 749, 751 (N.D. Tex. 1998) (involving wrongful termination claim in which plaintiff sent sexually explicit and racially offensive e-mail); *Wilson-Simmons v. Lake County Sheriff's Dep't*, 982 F. Supp. 496, 498 (N.D. Ohio 1997) (referring to plaintiff's claims that other employees used e-mail system "to make racial slurs against her"); *Vicarelli v. Business Int'l, Inc.*, 973 F. Supp. 241, 242 (D. Mass. 1997) (referring to allegations that plaintiff's supervisor sent "sexually charged e-mails and letters to her home . . ."); *Rudas v. Nationwide Mut. Ins. Co.*, No. 96-5987, 1997 WL 11302, at \*1 (E.D. Pa. Jan. 10, 1997) (describing "graphic e-mail messages stating [supervisor's] sexual desire for plaintiff coupled with his evaluation of her physical attributes"); see also *Zhang v. Massachusetts Inst. of Tech.*, 708 N.E.2d 128, 133-34 (Mass. App. Ct. 1999) (rejecting plaintiff's race discrimination claim that "rest[ed] entirely upon the electronic mail messages sent by [defendant's representative] in which he twice use[d] the term 'tar baby' . . ." because plaintiff was "not a member of the minority who rightfully take offense to that term . . .").

65. See *Brill v. Lante Corp.*, 119 F.3d 1266, 1268 (7th Cir. 1997) (citing e-mail that alleged that plaintiff referred to a client as "an 'idiot' and an 'asshole' and said he should be shot"); *Williams v. Bayer Corp.*, 982 F. Supp. 120, 124 (D. Conn. 1997) (considering "threatening e-mail" that plaintiff sent to a co-worker in finding that employer reasonably concluded that plaintiff would "present an untenable risk to the safety and productivity of other . . . employees").

66. See *Smith v. Department of Hous. & Urban Dev.*, No 98-3334, 1999 WL 110634, at \*1 (Fed. Cir. Feb. 9, 1999) (per curiam) (affirming dismissal of plaintiff's whistleblower retaliation claim because plaintiff's e-mail to agency's director criticized only private misbehavior and did not assert any government misconduct); *Cerwinski v. Insurance Servs. Office, Inc.*, No. 96-9368, 1997 WL 234672, at \*2 (2d Cir. May 8, 1997) (agreeing with the EEOC's finding that plaintiff was discharged because of improper e-mail use); *Lloyd v. Jefferson*, 53 F. Supp. 2d 643, 651 (D. Del. 1999) (citing e-mail in which defendants allegedly disparaged

plaintiffs offered evidence of purported jokes sent by e-mail to provide the basis for discrimination claims.<sup>67</sup>

Not only did shocking e-mail messages provide the underlying basis for discrimination claims, but litigants also offered potentially innocuous e-mail messages to support their discrimination claims. For example, a supervisor sent an e-mail to an employee stating, among other things, that it was “great to see someone of your age accomplish something like this!!!! You and George Burns are an inspiration to the elderly EVERYWHERE!!!”<sup>68</sup> The recipient then relied on this e-mail in making an age discrimination claim. Although the court rejected plaintiff’s claim, finding that the e-mail did “not reflect a discriminatory attitude,”<sup>69</sup> the employer was forced to incur the cost (and perhaps the embarrassment) of defending the e-mail in court.

Apart from deciding issues based on the content of e-mail, courts have suggested that the frequency or number of e-mail messages sent may provide the basis for a harassment claim. One court hypothesized that a supervisor sending a large number of annoying, but not otherwise improper, e-mail messages could provide evidence of a hostile work environment.<sup>70</sup> Other courts addressed disputes arising out of allegations of sending an excessive quantity of personal e-mail, mistakenly addressed e-mail, and e-mail sent to an employee’s

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plaintiff “and assert[ed] her use of state time to handle personal business”); *Blackford v. Battelle Mem’l Inst.*, No. CS-98-032-FVS, 1999 WL 592391, at \*1 (E.D. Wa. April 23, 1999) (referring to plaintiff’s claim that he was reassigned following a “flurry of e-mail” prompted by his objection to a co-worker’s purportedly illegal copying of an article); *Amro v. Boeing Co.*, 951 F. Supp. 1533, 1555 (D. Kan. 1997) (noting plaintiff relied on e-mail message for retaliation/national origin discrimination claim).

67. See *Curtis v. DiMaio*, 46 F. Supp. 2d 206, 208, 213 (E.D.N.Y. 1999) (explaining race-based discrimination case in which plaintiffs allege that “the defendants sent, and one [defendant] encouraged sending, electronic mail messages . . . that were allegedly offensive to African-Americans”; the court observed that “case law makes clear that the sending of a single offensive e-mail does not create a hostile work environment”); *Owens v. Morgan Stanley & Co.*, No. 96 CIV. 9747 (DLC), 1997 WL 403454, at \*1 (S.D.N.Y. July 17, 1997) (“e-mail containing racist jokes”); *Hickey-McAllister v. British Airways*, 978 F. Supp. 133, 136 (E.D.N.Y. 1997) (“plaintiff attached to the complaint one joke with sexual content which was distributed via email”); *Opp v. Source One Management, Inc.*, 591 N.W.2d 101 (N.D. 1999) (finding no actionable sexual harassment claim where plaintiff alleged that apparently innocuous cards, comments and e-mail were sexual in nature).

68. *Ellison v. Premier Salons Int’l, Inc.*, 981 F. Supp. 1219, 1222 (D. Minn. 1997).

69. *Id.*; see also *Spelios v. Aetna Life Ins. Co.*, No. 3:97CV1482 (WWE), 1999 U.S. Dist. LEXIS 10254, at \*11 (D. Conn. June 25, 1999) (citing e-mail from co-worker received on plaintiff’s 50th birthday stating “Left you a voice mail letting you know that I didn’t forget you really are officially old . . . I hear the AARP literature is really good . . . So when are you going to retire so I can take your place?”).

70. See *Griswold v. Fresenius USA, Inc.*, 978 F. Supp. 718, 728 (N.D. Ohio 1997).



home.<sup>71</sup>

Cases involving e-mail from the late 1990s also show that e-mail technology is becoming essential in the workplace and that employers are stressing the importance of using e-mail. One court upheld an employer's termination decision, reasoning that an employee had a "duty to check her e-mail every day," but that she failed to do so "in a timely manner."<sup>72</sup>

Several cases addressed discrimination or retaliation allegations based, in part, on a claim that an employer had treated the plaintiff differently from other similarly situated employees with regard to e-mail use policies.<sup>73</sup> In a case where an employer required its employees to use e-mail at work, a court struggled with a disability discrimination claim based on an allegation that plaintiff's vision impairment prevented her from using e-mail.<sup>74</sup> On appeal, a divided court reversed a verdict for plaintiff on a reasonable accommodation claim, but affirmed a verdict for plaintiff on her claim of differential

71. See *Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 857-58, 864 (7th Cir. 1997) (noting that one co-employee received "more personal e-mails from [plaintiff] than from anyone else" working for her employer and noting "mistakenly sent" e-mail as well as an "excessive number of personalized e-mails"); *Vicarelli v. Business Int'l, Inc.*, 973 F. Supp. 241, 242 (D. Mass. 1997) (noting "sexually charged e-mails and letters [sent] to [plaintiff's] home"); *Cedeno v. Montclair State Univ.*, 725 A.2d 38 (N.J. Super. Ct. App. Div. 1999) (referring to employer's use of evidence of excessive use of e-mail system as legitimate non-discriminatory reason for terminating plaintiff).

72. *Farmer v. Continental Ins. Co.*, 955 F. Supp. 970, 973, 977 (N.D. Ill. 1997); see also *Garrity v. Nationsbank of Texas, N.A.*, No. CIV. 3:98CV0437-H, 1999 WL 76785, at \*5 - \*6 (N.D. Tex. Feb. 3, 1999) (citing e-mailed performance reviews in granting defendant's summary judgment motion of plaintiff's gender discrimination claim); *Muska v. AT&T Corp.*, No. 96CS952, 1998 WL 544407, at \*3 (N.D. Ill. Aug. 25, 1998) (referring to evidence supporting termination decision, including evidence that plaintiff failed to open two-thirds of her e-mail).

73. See *Patel v. Allstate Ins. Co.*, 105 F.3d 365 (7th Cir. 1997) (referring to monthly schedule e-mail that employer required); *Gregg v. New York State Dep't of Taxation & Fin.*, No. 97 CIV. 1408 (MBM), 1999 WL 225534, at \*2, \*10, \*13 (S.D.N.Y. April 19, 1999) (citing plaintiff's allegation that he had "to report his attendance every day via e-mail" to his supervisor when other purportedly similarly situated individuals did not); *Day v. Northern Ind. Pub. Serv. Co.*, 987 F. Supp. 1105, 1112 (N.D. Ind. 1997) (addressing plaintiff's allegation that "she was required to e-mail all supervisors whenever she took a late lunch break, although two other presumably non-Black employees were not required to do so"), *aff'd*, 164 F.3d 382 (7th Cir. 1999); *Whitten v. Employment Sec. Dep't*, No. E96-219, 1997 WL 688869, at \*1 (Ark. Ct. App. Oct. 29, 1997) ("Appellant testified that she was the only one in her office required to e-mail the manager . . . when she arrived for work or left work."); see also *Cochrane v. Houston Light & Power Co.*, 996 F. Supp. 657, 661 (S.D. Tex. 1998) (plaintiff counseled for sending e-mail messages); *Wildberger v. Federal Labor Relations Auth.*, 132 F.3d 784, 794 (D.C. Cir. 1998) (citing plaintiff's allegation that she was prohibited "from using various agency resources (such as e-mail) for personal reasons").

74. See *Cathcart v. Flagstar Corp.*, No. 97-1977, 1998 WL 390834 (4th Cir. June 29, 1998).

treatment, because of her disability.<sup>75</sup>

At times, e-mail may be used as a crutch for employees who do not get along well with others, at least in person. Several courts have addressed disparate treatment claims in which certain employees limited their communication and contact with each other to e-mail messages.<sup>76</sup> Similarly, an employee's inability to communicate effectively using e-mail also has resulted in adverse employment decisions. In one case, as part of a termination decision, an employer alleged that the plaintiff employee "failed to communicate effectively through interoffice e-mail."<sup>77</sup>

In addition to e-mail use, denying access to e-mail or destroying e-mail is surfacing as a basis for discrimination claims. In one case, the court rejected plaintiff's claim that an employer's "computer lock down," which temporarily prevented plaintiff from using e-mail, constituted an adverse employment action.<sup>78</sup> Another court considered a race discrimination and harassment claim in which plaintiff alleged that "defendants erased electronic mail files."<sup>79</sup> Courts also considered claims that "someone 'manipulating' the e-mail system" created allegedly improper e-mail.<sup>80</sup>

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75. See *id.* at \*1.

76. See *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1244 (8th Cir. 1998) (noting plaintiff's supervisor "avoided verbal communication with [plaintiff] and instead used electronic mail"); *Ruane v. Continental Cas. Co.*, No. 96 Civ. 7153(LBS), 1998 WL 292103, at \*2 (S.D.N.Y. June 3, 1998) (noting supervisor's interaction with plaintiff usually was limited to "email or telephone"); *Powers v. Dallas County Community College Dist.*, No. CA3:96-1087-BC, 1997 WL 446442, at \*6 (N.D. Tex. July 16, 1997) (noting defendant's decision to terminate plaintiff when, among other things, plaintiff allegedly "refus[ed] to communicate with [her supervisor] except by e-mail"); *Gliner v. Saint-Gobain/Norton Indus. Ceramics Corp.*, No. 74055, 1999 WL 380434, at \*16 (Ohio Ct. App. June 10, 1999) (claiming disparate treatment because co-worker "would not speak to her in person for perhaps weeks on end, relying instead on interoffice electronic mail via their computers").

77. *Melendez v. Presbyterian Hosp.*, No. 97 Civ. 3017(KTD), 1998 WL 395268, at \*1 (S.D.N.Y. July 14, 1998).

78. *Swanson v. Civil Air Patrol*, 37 F. Supp. 2d 1312, 1328 (M.D. Ala. 1998); *accord Sharpe v. MCI Telecomms. Corp.*, 19 F. Supp. 2d 483 (E.D.N.C. 1998); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.*, 11 F. Supp. 2d 1006 (N.D. Ill. 1998). Cf. *Luedtke v. BHP Petroleum (Americas) Inc.*, No. 07-97-0442-CV, 1999 WL 343427, at \*2 (Tex. Ct. App. Apr. 12, 1999) (alleging defendant improperly "confiscated his lap top computer for the purpose of viewing his e-mail which was personal in nature").

79. *Skeete v. IVF Am., Inc.*, 972 F. Supp. 206, 208 (S.D.N.Y. 1997).

80. *Lumpkin v. Brown*, 960 F. Supp. 1339, 1342 (N.D. Ill. 1997); see also *Hitchcock v. Woodside Literary Agency*, 15 F. Supp. 2d 246, 249 (E.D.N.Y. 1998) (alleging defendant sent offensive messages to third parties in a manner as to make it appear that they were written by the plaintiff); *Hatch v. Fred Meyer, Inc.*, No. 42304-5-I, 1999 WL 106923, at \*1 (Wash. Ct. App. Mar. 1, 1999) (arguing that evidence that co-worker once used plaintiff's computer to send sexually suggestive e-mail did not establish sexual harassment and prank e-mail was not

Moreover, it is not just plaintiff employees that are using e-mail in litigation in the employment context. With increasing frequency, employers are successfully defending against harassment claims by pointing to written and implemented corporate e-mail use policies.<sup>81</sup> For example, one court noted that the defendant employer had an established policy regarding the use of e-mail, had issued a memorandum so that employees were aware of the policy, and held two meetings with employees to discuss that policy.<sup>82</sup> Such cases reinforce the need for a well reasoned, written, published, implemented and administered e-mail use and retention policy.<sup>83</sup>

Recognizing the ability of e-mail technology to determine whether and when a message is received, several courts examined e-mail to determine whether an individual or employer had notice of a policy or issue in the workplace.<sup>84</sup> E-mail can be used to communicate effectively, quickly and inexpensively with a large number of individuals simultaneously. In one case, an employer

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defamatory because it did not contain statements about plaintiff and recipient immediately understood that prankster, rather than plaintiff, had sent the e-mail); *cf. Benson v. Northwest Airlines, Inc.*, 561 N.W.2d 530, 534 (Minn. Ct. App. 1997) (involving, inter alia, purportedly unauthorized access to plaintiff's e-mail).

81. See *Schwenn v. Anheuser-Busch, Inc.*, No. CIV.A.95-CV-716 (RSP/GJD), 1998 WL 166845, at \*1 (N.D.N.Y. Apr. 7, 1998) (referring to company policy "against sexual harassment, including sexual harassment via e-mail"); *Daniels v. WorldCom Corp.*, No. CIV.A.3:97-CV-0721-P, 1998 WL 91261, at \*1, \*4 (N.D. Tex. Feb. 23, 1998).

82. See *Daniels*, 1998 WL 91261, at \*4.

83. See generally Paul E. Hash & Christina M. Ibrahim, E-Mail, *Electronic Monitoring, and Employee Privacy*, 37 S. TEX. L. REV. 893 (1996); Christopher S. Miller & Brian D. Poe, *Employment Law Implications in the Control and Monitoring of E-Mail Systems*, 6 U. MIAMI BUS. L.J. 95 (1997); Alexander I. Rodriguez, Comment, *All Bark, No Byte: Employee E-Mail Privacy Rights in the Private Sector Workplace*, 47 EMORY L.J. 1439 (1998); Patrice S. Arend & Kathleen M. Holper, *Monitoring E-Mail in the Workplace: Employee Privacy and Employer Liability*, 87 ILL. BAR. J. 315 (June 1999); *Employers are Screening E-Mail: The Smoking Gun of the 90's*, SEATTLE TIMES, Mar. 22, 1999, at C1; Samuel A. Thumma & Patricia R. Hubbard, *E-Mail Can Deliver Legal Problems*, ARIZ. BUS. GAZETTE, Oct. 17, 1996 (Employee Relations Supp.), at 15.

84. See *Nevin v. United States*, 43 Fed. Cl. 151 (1999) (referring to generally distributed e-mail stating that certain employees were ineligible to participate in employee buyout program that prevented plaintiff from relying on agency's subsequent error in supplying buyout application); *DiFrank v. Neely*, Nos. 96-15503, 96-15547, 1997 WL 330633 (9th Cir. June 11, 1997); *Jenkins v. Department of Veterans Affairs*, No. 97-3388, 1997 WL 758777, at \*1 (Fed. Cir. Dec. 10, 1997); *Edmond v. Fujitsu-ICL Sys., Inc.*, No. CA3:95-CV-2548-BC, 1997 WL 118406 (N.D. Tex. Mar. 5, 1997); *Angleton v. Beech Aircraft Corp.*, No. 96-1027-JTM, 1997 WL 446262, at \*2 (D. Kan. July 30, 1997); *Kelly v. UHC Management Co.*, 967 F. Supp. 1240, 1249 (N.D. Ala. 1997); *Lynch v. EG & G Mound Applied Techs., Inc.*, No. 17333, 1999 WL 34790 (Ohio Ct. App. Jan. 29, 1999) (affirming summary judgment for defendant on the ground, in part, that e-mail announcing program to employees had expressly stated that participation was at company's discretion); *Cade v. State*, 990 S.W.2d 32 (Mo. Ct. App. 1999) (e-mail warning of dress code).

defending against racial discrimination claims pointed out that all employees had equal access to job openings because the employer sent e-mail notices for job openings to all employees.<sup>85</sup> Finally, in several cases in the late 1990s, employers offered e-mail to demonstrate that employment decisions were proper and justified.<sup>86</sup>

### C. Commercial Cases

In the late 1990s, the United States and several individual states filed an antitrust action against Microsoft Corporation, which is arguably the most publicized e-mail case to date.<sup>87</sup> In one generally available opinion, the court considered the force of purported admissions in e-mail obtained from defendant Microsoft.<sup>88</sup> According to the government, the e-mail messages indicated that Microsoft wanted to drive its rival, Netscape, out of the market for Internet browsers. Microsoft's apparent e-mail messages about the

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85. See *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 750 (4th Cir. 1998), *vacated on other grounds*, 119 S. Ct. 2388 (1999).

86. See *Jenkins*, 1997 WL 758777, at \*1 (e-mail showed that terminated employee had received employer's leave policy); *Comiskey v. Automotive Indus. Action Group*, 40 F. Supp. 2d 877 (E.D. Mich. 1999) (citing e-mail as evidence to establish that employer terminated plaintiffs for legitimate, non-discriminatory reasons); *Duncan-Young v. Pine St. Inn*, No. 95-11913-GAO, 1997 WL 136337 (D. Mass. Feb. 24, 1997) (finding e-mail among supervisors established that employer terminated plaintiff because of poor job performance); *Coover v. Saucon Valley Sch. Dist.*, 955 F. Supp. 392, 395 (E.D. Pa. 1997) (referring to e-mail establishing school district's reason for terminating superintendent, who had filed 42 U.S.C. § 1983 action alleging violations of free speech and due process).

87. See, e.g., Hiawatha Bray, *Microsoft Claims U.S. Antitrust Appointee is Biased: Cites Harvard Law Professor's E-Mail to Netscape*, BOSTON GLOBE, Jan. 7, 1998, at C2; Paul Davidson, *AOL E-Mail Spices Up Microsoft Trial: Could Net Service Stop Monopoly*, USA TODAY, June 15, 1999, at 03B; James V. Grimaldi, *Microsoft Trial: Gates' Spat with Intel is Revealed by E-Mail*, SEATTLE TIMES, June 23, 1999, at E1; Carolyn Lochhead, *Microsoft Appears in Trouble at Trial*, S.F. CHRON., Nov. 23, 1998, at A1; Steve Lohr, *Antitrust Case is Highlighting Role of E-mail*, N.Y. TIMES, Nov. 2, 1998, at C1; *Microsoft Trial Casts Suspicious New Light on E-Mail*, SACRAMENTO BEE, Nov. 19, 1998, at B7; *Microsoft Ordered to Give Up Message: E-Mail Sought in Antitrust Trial Details Net Browser-Windows Link*, HOUS. CHRON., Jan. 29, 1999, at 2; Paul Van Slambrouck, *E-Mail Culture Goes to Court: Microsoft Case Shows How Perception of E-Mail as Private and Casual Clashes with Efforts to Use it in Litigation*, CHRISTIAN SCI. MONITOR, Oct. 23, 1998; John R. Wilke, *Microsoft Case: Tapes, E-Mail and Meetings*, WALL ST. J., Oct. 5, 1998, at B1; *Witness Denies Browser Rivalry: Exec Disavows Own E-Mail on Netscape*, SAN JOSE MERCURY NEWS, Feb. 23, 1999, at 1C; see also Karen Donovan, *E-Mails Helped Microsoft in Conn.*, NAT'L L.J., Aug. 2, 1999, at A1 (discussing private antitrust claims involving e-mail).

88. See *United States v. Microsoft Corp.*, No. CIV.A.98-1232, 1233 (TPJ), 1998 WL 614485 at \*4-\*6 (D.D.C. Sept. 14, 1998) (listing numerous purported admissions and other evidence in defendant's internal e-mail); cf. *In re Potash Antitrust Litig.*, 954 F. Supp. 1334, 1387 (D. Minn. 1997) (noting e-mail regarding support of price increases in addressing antitrust claims).

importance of increasing Microsoft's share of the browser market, at the expense of competitors, have become a lasting record of its competitive motives, perhaps belying Microsoft's assertion that it never intended to compete unfairly.<sup>89</sup>

In terms of publicity, a close second to *Microsoft* was *Reno v. ACLU*, the 1997 Supreme Court decision describing in detail e-mail systems and striking, on First Amendment grounds, the indecent transmission and patently offensive display provisions of the Communications Decency Act.<sup>90</sup>

Several e-mail cases decided in the late 1990s addressed claims by or against Internet service providers arising out of alleged misuse of those services, including sending bulk, unsolicited e-mail.<sup>91</sup> Other courts addressed competition issues arising out of e-mail use. For example, one court considered claims by competing Internet service providers arising out of purportedly improper customer solicitation,<sup>92</sup> while another court found that customer data, including e-mail addresses, constituted trade secrets.<sup>93</sup> Other cases considered e-mail as evidence of trade confusion<sup>94</sup> or trademark infringement, including purported consumer confusion.<sup>95</sup> Courts also addressed Electronic

89. See *United States v. Microsoft Corp.*, No. 98-1232, slip op. at 78, 138 (D.D.C. Nov. 5, 1999).

90. *Reno v. ACLU*, 521 U.S. 844 (1997); see also *ACLU v. Reno*, 31 F. Supp. 2d 473, 494 (E.D. Pa. 1999) (granting motion for preliminary injunction against enforcement of Child Online Protection Act ("COPA"), the Court noted difficulty in determining "the age of user who is accessing material through e-mail" as a factor in holding that COPA may violate First Amendment).

91. See *Zeran v. America Online, Inc.*, 129 F.3d 327, 328-29 (4th Cir. 1997); *America Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851 (E.D. Va. 1999) (finding that plaintiff's effort to exclude unsolicited bulk e-mail was not anti-competitive conduct); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D. Va. 1998); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998); *America Online, Inc. v. Prime Data Sys., Inc.*, No. 97-1652-A, 1998 U.S. Dist. LEXIS 20226 (E.D. Va. Nov. 20, 1998); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C-98-20064 JW, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

92. See *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998).

93. See *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 23 (Tex. App. 1998) (noting that customer database, including "e-mail addresses," constituted a trade secret); cf. *Doubleclick, Inc. v. Henderson*, No. 116914/97, 1997 WL 731413, at \*1, \*3 (N.Y. Sup. Ct. Nov. 7, 1997) (referring to evidence of "e-mail . . . and other strategic documents" retrieved from defendant's computer offered in support of plaintiff's claim of misappropriation of trade secrets).

94. See *Primedia Intertec Corp. v. Technology Mktg. Corp.*, 35 F. Supp. 2d 809 (D. Kan. 1998) (involving trademark action in which plaintiff produced two e-mails from confused individuals); *Breuer Elec. Mfg. Co. v. Hoover Co.*, No. 97-C-7443, 1998 WL 427595, at \*10 (N.D. Ill. July 23, 1998) (considering e-mail "indicating at most temporary confusion").

95. See *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d

Communications Privacy Act claims involving the alleged interception and distribution of e-mail.<sup>96</sup>

In the late 1990s, litigants also used e-mail to support or undercut arguments unrelated to technology. For example, in a government contract action, one party submitted an e-mail showing that the government had received notice of a funding overrun.<sup>97</sup> In another case, a plaintiff offered e-mail from defendant as an admission that defendant intended to use plaintiff's products.<sup>98</sup> And in other cases, the courts allowed the introduction of e-mail as extrinsic evidence to construe contracts, including the parties' contractual intent and the scope of contractual rights.<sup>99</sup>

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1036, 1052 (9th Cir. 1999) (explaining that rights to use a term could vest when a defendant begins to use that term in e-mail correspondence in a manner that was sufficiently public to identify the good in the public mind); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (granting leave to identify party who had forwarded to trademark holder 31 e-mail showing consumers' actual confusion as part of offer to sell potentially infringing domain names); *Washington Speakers Bureau, Inc. v. Leading Authorities, Inc.*, 33 F. Supp. 2d 488 (E.D. Va. 1999) (finding evidence of e-mails unpersuasive because they did not clearly establish actual consumer confusion); *Hard Rock Cafe Int'l (USA), Inc. v. Morton*, No. 97 Civ. 9483 (RPP), 1999 WL 717995, at \*1, \*18 (S.D.N.Y. Sept. 9, 1999) (involving trademark infringement claim in which plaintiff presented e-mail showing customer confusion); *Playboy Enters., Inc. v. Calvin Designer Label*, No. CIV.A.C-97-3204 CAL, 1999 WL 329058, at \*3 (N.D. Cal. May 7, 1999) (finding that defendant had contacted Internet web sites via e-mail with an offer to participate in purportedly infringing product); *Radio Channel Networks, Inc. v. Broadcast.com, Inc.*, No. 98 CIV. 4799 (RPP), 1999 WL 124455 (S.D.N.Y. Mar. 8, 1999) (rejecting plaintiff's assertion that three e-mails that it sent to defendant demonstrated that defendant knew that it was illegally using plaintiff's trademark); *CIT Group, Inc. v. Citicorp*, 20 F. Supp. 2d 775, 789 (D.N.J. 1998) (involving claim of likelihood of confusion between CITGROUP.COM and CITIGROUP.COM "in the context of E-mail"); *Playboy Enters., Inc. v. Universal Tel-A-Talk, Inc.*, No. 96-6961, 1998 U.S. Dist. LEXIS 17282 (E.D. Pa. Nov. 2, 1998) (finding defendant infringed on Playboy's trademark, in part, by using "Playboy" in its e-mail address); *Reed Publ'g B.V. v. Execulink, Inc.*, No. 98-1049, 1998 U.S. Dist. LEXIS 18245 (D.N.J. Nov. 17, 1998) (enjoining defendant from using e-mail addresses that are similar to plaintiff's e-mail addresses); *Amicus Communications, L.P. v. Hewlett-Packard Co.*, No. CIV.A.SA-98CA1176PMA, 1999 WL 495921, at \*16 (W.D. Tex. June 11, 1999) (refusing to find "that three misdirected e-mails, of 'unsubstantiated legitimacy' received by plaintiff are dispositive of the issue of confusion").

96. See *Wesley College v. Pitts*, 974 F. Supp. 375 (D. Del. 1997), *aff'd*, 172 F.3d 861 (3d Cir. 1998); see also *United States v. Moriarty*, 962 F. Supp. 217, 219 (D. Mass. 1997) (noting government's position that entering a computer system and changing codes that permit access to e-mail by authorized users could be a violation of Electronic Communications Privacy Act).

97. See *Northrop Grumman Corp. v. United States*, 42 Fed. Cl. 1, 5 (1998).

98. See *Pearson v. Quickturn Design Sys.*, No. Civ. 97-20907 SW, 1998 WL 34607, at \*1, \*3 (N.D. Cal. Jan. 23, 1998) (noting that plaintiff software developer, citing e-mail from former client's employee, claimed former client was motivated to continue using plaintiff's software).

99. See *Judson v. Development Techs., Inc.*, No. 97-1816, 1998 WL 398784, at \*1 (4th Cir. July 9, 1998) (arising out of royalty dispute in which plaintiff sent "a series of e-mails requesting sales figures for 1995 so that he could 'evaluate what has to happen, per our

Courts in the late 1990s considered e-mail purporting to show that a party had notice or knowledge of certain potentially dangerous conditions.<sup>100</sup> A suit by a retailer against a law firm for an accounting to determine liability for legal services implicated e-mail messages.<sup>101</sup> The court cited the retailer's internal e-mail messages, concluding, after review of "many of the accounts," that the attorney was "charging for fees and costs that were never billed to [the retailer] over an extended period of time."<sup>102</sup> Litigants offered e-mail messages to support statute of limitations, laches, statute of frauds and related defenses.<sup>103</sup> In short, whether or not technology-based, cases from the late 1990s show that e-mail messages are arising in and materially affecting commercial disputes with increasing frequency.

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agreement"); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) ("The exchange of e-mails . . . does not satisfy statutory requirement of a written instrument signed by the Defendants [for purposes of licensing agreement]."); *Aurora Natural Gas, L.L.C. v. Continental Natural Gas, Inc.*, No. CA 3:98-CV-1348-BC, 1999 WL 304561, at \*8, \*11 (N.D. Tex. May 10, 1999) (referring to e-mail as evidence of whether contract existed or was modified); *New Line Prods., Inc. v. Little Caesar Enters.*, No. CV 97-7073 DT (SHX), 1999 WL 420185, at \*2 (C.D. Cal. May 3, 1999) (noting e-mail between plaintiff's representatives "expressing concern that Defendant was not familiar with entertainment tie-in/marketing programs" and other e-mail suggesting that a new contract was being drafted with changes); *Green Book Int'l Corp. v. Inunity Corp.*, 2 F. Supp. 2d 112 (D. Mass. 1998) (noting e-mail regarding proposed use of software and understanding of scope of license); *Raad v. Wal-Mart Stores, Inc.*, 13 F. Supp. 2d 1003, 1005 (D. Neb. 1998) (noting witness testified that she requested a price quote on certain products via e-mail); *Safeco Ins. Co. of America v. Wood*, 948 S.W.2d 182 (Mo. Ct. App. 1997) (citing e-mail as evidence of when homeowner was covered by insurance); *Umbro Int'l, Inc. v. 3263851 Canada, Inc.*, No. 174388, 1999 WL 117760, at \*4 (Va. Cir. Ct. Feb. 3, 1999) (noting that 90% of defendant's 3.5 million registration contracts were transacted via e-mail with no other form of human contact); *Messmore v. Safeco Ins. Co. of America*, No. 16705-4-III, 1999 WL 141203, at \*4 (Wash. Ct. App. Mar. 11, 1999) (rejecting plaintiffs' argument that e-mail from insurance company seeking information regarding plaintiffs' claim modified contract or implied a promise to cover loss).

100. See *Premier Parks, Inc. v. Baltimore Gas & Elec. Co.*, 37 F. Supp. 2d 732, 736 (D. Md. 1999) (referring to plaintiff's use of defendant's internal e-mail to try to establish that willful neglect caused power outage); *In re Air Crash Near Roselawn, Ind.*, No. 95 C 4593, MDL 1070, 1997 WL 572896, at \*4 (N.D. Ill. Sept. 10, 1997) (holding that an "e-mail may be used to establish [defendant's] awareness and knowledge"); *Holder v. Mellon Mortgage Co.*, 954 S.W.2d 786, 791 (Tex. App. 1997) (noting e-mail from employee lodging "a formal complaint about the virtually non-existent security for our parking garage," which put the company on notice of the issue).

101. See *Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C.*, 128 F.3d 10 (1st Cir. 1997).

102. *Id.* at 14.

103. See *Monsanto Co. v. Haskel Trading, Inc.*, 13 F. Supp. 2d 349, 359-61 (E.D.N.Y. 1998) (citing to defendant's use of e-mail message to support acquiescence and laches defenses); *MCI Telecomms. Corp. v. Value Call Int'l*, 988 F. Supp. 1376, 1383 n.12 (D. Kan. 1997) (e-mails did not satisfy statute of frauds).

#### D. Procedural Cases

Increasing use of e-mail by lawyers and the ability to instantaneously transmit documents via e-mail has resulted in courts considering e-mail in deciding procedural issues. There are many judicial decisions delineating what properly can and cannot be filed or served via e-mail in several jurisdictions.<sup>104</sup> Other decisions considered e-mail in appeals. For example, one court noted “a copy of a dated and time stamped e-mail message” was competent evidence to show that an appeal was timely.<sup>105</sup> One court addressed an attempt to augment the record on appeal to include e-mail.<sup>106</sup> Another court criticized a prosecutor for including in the record on appeal “loose pieces of e-mail and checklists describing the Government’s attempts to reconstruct the record, none of which is germane.”<sup>107</sup>

Other cases considered whether e-mail messages constituted requests for public records and even whether e-mail are “records” under the applicable public records law.<sup>108</sup> In the administrative procedure context, one court noted that public comments were

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104. See *Yukiyo, Ltd. v. Watanabe*, 111 F.3d 883, 885-86 (Fed. Cir. 1997) (construing Fed. R. App. P. 25 as allowing electronic filing through “delivery via a network (the Internet), through an electronic mail system, and by filing a computer disk,” but not via CD-ROM); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (finding service of process by e-mail to addresses associated with defendant is not sufficient to comply with Federal Rules of Civil Procedure, but helped to demonstrate plaintiff’s good faith effort to comply with service of process requirements); *Borninski v. Texas Instruments, Inc.*, 32 F. Supp. 2d 918 (N.D. Tex. 1998) (noting that the court did not permit deposition notices via e-mail); *Jews for Jesus v. Brodsky*, 993 F. Supp. 282, 288 (D.N.J. 1998) (noting that defendant apparently was served with an order to show cause via e-mail), *aff’d*, 159 F.3d 1351 (3d Cir. 1998); *United States v. Haagenson*, No. NMCM 96 01296, 1998 WL 85579 (N-M. Ct. Crim. App. Feb. 18, 1998) (noting that trial counsel received notice of oral modification via e-mail), *review granted*, 50 M.J. 238 (C.A.A.F. Aug. 26, 1998); *Powell v. State*, 717 So. 2d 1050, 1052 (Fla. Dist. Ct. App. 1998) (noting defense counsel “attempted to communicate with the court by electronic mail and was told to expect no response to such electronic mailings”).

105. *Workers’ Compensation Div. v. Pampell*, No. 03-97-00124-CV, 1997 WL 576470, at \*2 (Tex. App. Sept. 18, 1997).

106. See *NBS Imaging Sys., Inc. v. State Bd. of Control*, 70 Cal. Rptr. 2d 237, 239 n.2 (Cal. Ct. App. 1997).

107. *United States v. Stephens*, No. NMCM 95 00306, 1997 WL 766468, at \*2 n.3 (N-M. Ct. Crim. App. Oct. 27, 1997).

108. See *Bonamy v. City of Seattle*, 960 P.2d 447, 448 (Wash. Ct. App. 1998) (involving plaintiff’s “e-mail inquiry about the status of his personnel files and the extent to which information is available to employees who have had an internal complaint filed against them” and considering whether e-mail was a request for public records); *State ex rel. Wilson-Simmons v. Lake County Sheriff’s Dep’t*, 693 N.E.2d 789, 792-93 (Ohio 1998) (finding plaintiff was not entitled to writ because e-mail was not “records” under Public Records Act and that e-mail was no longer available due to plaintiff’s delay in bringing action).



received by an administrative agency via e-mail.<sup>109</sup> In another administrative procedure case, plaintiffs claimed that internal e-mail in which a state agency took a position on a government contracting issue constituted an agency rule.<sup>110</sup> One court considered e-mail in contempt proceedings to determine whether an agency complied with the court's order.<sup>111</sup>

E-mail cases from the late 1990s also addressed timeworn issues where the relevant medium happened to be e-mail. For example, several cases considered whether selected e-mail messages were protected from production by the attorney-client privilege or work product protection, with courts recognizing that e-mail should be given the same protection as traditional written and verbal communications and work product.<sup>112</sup> Another court, in considering a claim that two corporations were separate entities for purposes of a discovery request, relied in part on their inter-connected e-mail system to compel production of documents from both the party corporation and the non-party corporation.<sup>113</sup>

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109. See *US West Communications, Inc. v. New Mexico State Corp.* Comm'n, 965 P.2d 917, 919 (N.M. 1998) (noting "members of the public sent scores of letters and e-mails to the Commission").

110. See *Environmental Trust v. Florida*, 714 So. 2d 493, 499 (Fla. Dist. Ct. App. 1998).

111. See *Arkansas Dep't of Human Servs. v. R.P.*, 970 S.W.2d 225, 229 (Ark. 1998); see also *American Airlines, Inc. v. Allied Pilots Ass'n*, 53 F. Supp. 2d 909, 924-25 (N.D. Tex. 1999) (citing e-mail regarding notice of and compliance with temporary restraining order and purported "sick-out" arising out of labor-management dispute).

112. See *United States v. Motorola, Inc.*, No. Civ.A.94-2331TFH/JMF, 1999 WL 552553, at \*3, \*6, \*7 (D.D.C. May 28, 1999) (granting, in part, motion to compel production of documents, including e-mail, which were withheld under attorney-client privilege); *Hronek v. DEA*, 16 F. Supp. 2d 1260, 1272 (D. Or. 1998); *Interphase Corp. v. Rockwell Int'l Corp.*, No. 3-96-CV-0290-L, 1998 WL 664969, at \*3 (N.D. Tex. Sept. 22, 1998) (finding e-mail from attorney containing legal advice was protected by attorney-client privilege); *Overseas Private Inv. Corp. v. Mandelbaum*, No. CIV.A.97-1138CKK/JMF, 1998 WL 647208, at \*1-\*3 (D.D.C. Aug. 19, 1998) (holding certain e-mail was not protected by attorney-client privilege); *Vazquez v. Sears Roebuck & Co.*, Nos. 84 B 00224, 97 A 00407, 1998 WL 191271, at \*5 (Bankr. N.D. Ill. Apr. 21, 1998) (finding interoffice e-mail regarding customer information was not protected by work product doctrine); *North Dartmouth Properties, Inc. v. United States Dep't of H.U.D.*, 984 F. Supp. 65 (D. Mass. 1997) (finding specific e-mail regarding housing project managed by plaintiff exempt from production under FOIA); *Wesley College v. Pitts*, 974 F. Supp. 375 (D. Del. 1997) (determining that e-mail was not privileged or confidential and could be admissible in state court proceeding), *aff'd* 172 F.3d 861 (3d Cir. 1998); *Evans v. Atwood*, 177 F.R.D. 1, 8 (D.D.C. Nov. 18, 1997) (finding work product privilege did not apply to e-mail not prepared for use in lawsuit); *International Marine Carriers, Inc. v. United States*, No. 95 Civ. 10670(JGK)(MHD), 1997 WL 160371 (S.D.N.Y. Apr. 4, 1997).

113. See *Uniden America Corp. v. Ericsson, Inc.*, 181 F.R.D. 302, 307 (M.D.N.C. 1998) (noting that sister corporations "share information regularly, document requests are not refused, and they are part of the same internal e-mail system"; accordingly, party corporation would be compelled to obtain and produce documents from non-party sister corporation); see also

In another case, the court addressed a challenge to a subpoena duces tecum that gave the target "less than two days to go through 30 years of documents, including e-mail, computer data, etc."<sup>114</sup> One court relied on a party's duty to save potentially relevant "e-mail communications during the pendency of this litigation" and sanctioned that party when it failed to preserve all such e-mail.<sup>115</sup> Addressing a related topic, another court in a class action suit found that a party's efforts to preserve relevant documents, including e-mail, were not adequate and imposed a \$1,000,000 sanction to be paid to the court.<sup>116</sup>

E-mail cases from the late 1990s show that judges are recognizing that e-mail can provide creative and inexpensive procedural alternatives for managing complex, multi-party litigation. For instance, in addressing a settlement in a shareholder derivative action, one court noted that the settlement allowed shareholders to request a report via e-mail, adding that the "increased access or its expedition is consequently a real benefit both to the inquiring mind and to concerned . . . shareholders."<sup>117</sup>

### *E. Personal Jurisdiction*

With increasing frequency, courts are struggling with difficult personal jurisdiction issues where a party's contacts with a forum state are based on e-mail or Internet activity originating in a distant forum.<sup>118</sup> The court's exercise of personal jurisdiction over

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Northeastern Power Co. v. Balcke-Durr, Inc., 49 F. Supp. 2d 783, 785 (E.D. Pa. 1999) (attempting to establish of an alter ego/lack of corporate separateness argument by offering evidence that the defendant parent and subsidiary companies "shared a business address, telephone and facsimile lines and numbers, and e-mail addresses").

114. Reuters Ltd. v. Dow Jones Telerate, Inc., 662 N.Y.S.2d 450, 452 (N.Y. App. Div. 1997).

115. Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 631-32 (D. Utah 1998).

116. See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 617 (D.N.J. 1997); see also Bob Van Voris, *Spoliation Sanctions for Fen-Phen Maker*, NAT'L L.J., July 5, 1999, at A4 (discussing sanctions against American Home Products "for destroying e-mail evidence in a fen-phen wrongful death case").

117. *In re Texaco, Inc. Shareholder Litig.*, 20 F. Supp. 2d 577, 594 (S.D.N.Y. 1998).

118. See, e.g., 3D Sys. v. Aarotech Labs., Inc., 160 F.3d 1373, 1375 (Fed. Cir. 1998) (finding no personal jurisdiction); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 415 (9th Cir. 1997) (no personal jurisdiction); *Grutkowski v. Steamboat Lake Guides & Outfitters, Inc.*, No. 98-1453, 1998 U.S. Dist. LEXIS 20255, at \*2 (E.D. Pa. Dec. 21, 1998) (no personal jurisdiction); *Haas v. A.M. King Indus.*, 28 F. Supp. 2d 644, 650 (D. Utah 1998) (no personal jurisdiction); *Black & Decker, Inc. v. Pro-Tech Power, Inc.*, 26 F. Supp. 2d 834, 843 (E.D. Va. 1998) (no personal jurisdiction); *National Tel. Directory Consultants, Inc. v. Bellsouth Adver. & Publ'g Corp.*, 25 F. Supp. 2d 192 (S.D.N.Y. 1998) (no personal jurisdiction); *World Paper Resources, Inc. v. Buckeye Cellulose Corp.*, No. 98-2328-JWL, 1998 U.S. Dist. LEXIS 20475, at \*5-\*7 (D. Kan. Oct. 6, 1998) (finding personal jurisdiction); *Scherr v. Abrahams*, No. 97 C

companies that maintain web sites seems particularly troublesome. Some courts have exercised jurisdiction where a company's otherwise passive Internet web site invited web site visitors to contact the company via e-mail.<sup>119</sup> Other courts have held that the ability to contact the web site host via e-mail is insufficient to confer jurisdiction.<sup>120</sup> Not surprisingly, there is debate over the proper analysis to determine whether personal jurisdiction exists arising from e-mail or other Internet activity.<sup>121</sup> This debate likely will continue until the Supreme Court addresses the issue to delineate the proper test to apply. As with all personal jurisdiction issues, the inquiry promises to be fact-intensive and, accordingly, will continue to spawn

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5453, 1998 WL 299678, at \*5 (N.D. Ill. May 29, 1998) (no personal jurisdiction); Vitullo v. Velocity Powerboats, Inc., No. 97 C 8745, 1998 WL 246152, at \*2, \*5-\*7 (N.D. Ill. Apr. 27, 1998) (finding personal jurisdiction); Blumenthal v. Drudge, 992 F. Supp. 44, 56-57 (D.D.C. 1998) (finding personal jurisdiction); Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F. Supp. 636, 639 (E.D. Pa. 1998) (finding no personal jurisdiction); Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997) (no personal jurisdiction); Resuscitation Techs., Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567, at \*6 (S.D. Ind. Mar. 24, 1997) (finding personal jurisdiction); Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097, at \*1 (S.D.N.Y. Feb. 26, 1997) (finding no personal jurisdiction); Cody v. Ward, 954 F. Supp. 43, 47 (D. Conn. 1997) (finding personal jurisdiction); Conesco, Inc. v. Hickerson, 698 N.E.2d 816, 820 (Ind. Ct. App. 1998) (finding no personal jurisdiction); see also United States v. Kammerzell, 7 F. Supp. 2d 1196, 1197 (D. Utah 1998) (finding, in criminal context, that the "transmission of a threat from one Utah resident to another by means of email" has sufficient impact on interstate commerce to allow the court to exercise federal jurisdiction).

119. See *International Star Registry of America v. Bowman-Haight Ventures, Inc.*, No. 98 C 6823, 1999 WL 300285, at \*6-\*7 (N.D. Ill. May 6, 1999) (noting defendant's "web site invites inquiries from potential customers in Illinois via electronic mail"); *Purco Fleet Servs., Inc. v. Towers*, 38 F. Supp. 2d 1320, 1324 (D. Utah 1999) (finding personal jurisdiction under Utah's long-arm statute where company's interactive web site allowed customers in forum state to contact defendant via e-mail).

120. See *Desktop Techs., Inc. v. Colorworks Reprod. & Design, Inc.*, No. CIV.A.98-5029, 1999 WL 98572, at \*4 (E.D. Pa. Feb. 25, 1999) (finding defendant's interactive web site that allowed customer to respond, but not to place orders, via e-mail did not subject defendant to personal jurisdiction).

121. A discussion of the proper analysis to determine personal jurisdiction is beyond the scope of this article. See, e.g., Brian Covotta, *Personal Jurisdiction and the Internet: An Introduction*, 13 BERKELEY TECH. L.J. 265 (1998); Michael J. Dunne & Anna L. Musacchio, *Jurisdiction Over the Internet*, 54 BUS. LAW. 385 (1998); Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575 (1998); David D. Tyler, *Personal Jurisdiction Via E-Mail: Has Personal Jurisdiction Changed in the Wake of Compuserve, Inc. v. Patterson?*, 51 ARK. L. REV. 429 (1998); David Wille, *Personal Jurisdiction and the Internet - Proposed Limits on State Jurisdiction Over Data Communications in Tort Cases*, 87 KY. L.J. 95 (1999); Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace into International Shoe*, 8 SETON HALL CONST. L.J. 763 (1998); Christopher E. Friel, Comment, *Downloading a Defendant: Is Categorizing Internet Contacts a Departure from the Minimum Contacts Test?*, 4 ROGER WILLIAMS U. L. REV. 293 (1998).

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### *F. Criminal Cases*

The late 1990s yielded nearly forty e-mail cases in the criminal law context. With some frequency, e-mail has been implicated in criminal cases to address the validity of searches or search warrants.<sup>122</sup> Moreover, a significant number of e-mail cases in the criminal context involve child pornography and related issues involving minors.<sup>123</sup> Still other criminal cases involved troubling allegations

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122. See *United States v. Hibbler*, 159 F.3d 233, 235 (6th Cir. 1998) (involving purportedly pornographic e-mail seized from defendant's e-mail account); *United States v. Simons*, 29 F. Supp. 2d 324, 329 (E.D. Va. 1998) (denying defendant's motion to suppress seized e-mail on the grounds that the government did not need a warrant because it retrieved the messages from storage rather than by intercepting the messages during transfer); *United States v. Diaz*, Nos. 1998-42, 1998-43, 1998 WL 635849, at \*11-\*12 (D.V.I. Sept. 10, 1998) (finding information in e-mail supported "warrantless protective sweep" and helped to establish probable cause for arrest in cases involving fraudulent use of a credit card.); see also *Davis v. Gracey*, 111 F.3d 1472 (10th Cir. 1997) (concerning appeal based on purported violation of privacy rights following government seizure of computer bulletin board system including e-mail).

123. See *United States v. Burgess*, 175 F.3d 1261, 1262-1263, 1267-68 (11th Cir. 1999) (reversing conviction of traveling in interstate commerce with intent to engage in sexual act with a juvenile, the court noted defendant's failure to respond to purported victim's request to "e-mail me" and noted the jury's request for further entrapment instruction in light of e-mail purportedly sent by government); *United States v. Nanda*, No. 97-5001, 1999 WL 294648, at \*1 (4th Cir. 1999) (noting that defendant was identified as an individual "who had received an e-mail message containing an electronic file with child pornography pictures"); *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999) (affirming, in part, the conviction of defendant who had purportedly communicated via e-mail with a 14 year old girl prior to photographing and engaging in sexual activity with the girl); *United States v. Fabiano*, 169 F.3d 1299 (10th Cir. 1999) (upholding conviction for receipt of child pornography where jury found defendant knew of the contents of e-mail containing sexually explicit attachment files before he opened them); *United States v. Lorge*, 166 F.3d 516 (2d Cir. 1999) (upholding conviction for transmission of child pornography via Internet and e-mail); *United States v. Miller*, 166 F.3d 1153 (11th Cir. 1999) (considering purported use of e-mail to solicit teens to engage in sexual activity in determining base offense level for sentencing where defendant acknowledged the conduct in his plea agreement); *United States v. Simpson*, 152 F.3d 1241, 1244 (10th Cir. 1998) (affirming defendant's conviction of receiving child pornography that defendant allegedly had requested from an undercover agent via e-mail); *United States v. Moore*, 136 F.3d 1343, 1344 (9th Cir. 1998) (reversing conviction based on defendant's response to Internet advertisement via e-mail and correspondence with an undercover agent that included more than 100 e-mail messages in which defendant purportedly agreed to teach agent's fictitious minor children about sex); *United States v. Salvo*, 133 F.3d 943, 945 (6th Cir. 1998) (noting that defendant first came to the attention of law enforcement officials when officials at his college "discovered several suspicious e-mail messages"); *United States v. Monroe*, 50 M.J. 550 (A.F. Ct. Crim. App. 1999) (upholding conviction for transmission of child pornography via e-mail on grounds that defendant had no objective expectation of privacy because e-mail was authorized for official business only and all users received notice that e-mail was subject to monitoring each time they logged on); *State v. Pattno*, 579 N.W.2d 503, 505 (Neb. 1998) (noting a search of defendant's computer revealed "[s]everal e-mail communications between [defendant] and the [alleged victim]," suggesting they "shared a mutual affection for each other"); see also *United States v. Alkhabaz*, 104 F.3d 1492,

about the use of e-mail in stalking.<sup>124</sup>

Criminal cases also reveal the power of e-mail to transfer information and technology quickly and efficiently. For example, in one case, defendants were charged with attempted theft of trade secrets and conspiracy when an e-mail was allegedly sent outlining certain core technology.<sup>125</sup> Another court considered e-mail as evidence in determining the appropriate calculation of a prison sentence.<sup>126</sup> Courts also are being asked to look at the inherent ability of e-mail to easily and widely distribute material, which may compound the impact of certain criminal activity.<sup>127</sup> In addressing pre-trial motions, another court in a criminal case set forth a detailed evaluation of the admissibility of e-mail messages under certain exceptions to the hearsay rule, reasoning that the electronic messages (1) were not admissible as business records because they were not made as part of a routine business practice; (2) were not admissible as excited utterances because too much time had elapsed between the event and the creation of the e-mail; but (3) were admissible as present sense impressions because the messages explained an event immediately after the event had occurred.<sup>128</sup>

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1496 (6th Cir. 1997) (2-1 decision) (holding e-mail "expressing sexual interest in violence against women and girls" were not sufficient to establish criminal "communications containing a threat").

124. See *Bui v. State*, 964 S.W.2d 335, 339-40 (Tex. App. 1998) (noting that defendant intercepted victim's e-mail to track her to her employer, discovered her e-mail password, sent sexually explicit messages using her account and read her e-mail); see also *United States v. Casciano*, 124 F.3d 106, 109 (2d Cir. 1997) (involving harassment that included sending e-mail to victim); *People v. Munn*, 688 N.Y.S.2d 384 (N.Y. Crim. Ct. 1999) (denying defendant's motion to dismiss charge of second degree aggravated harassment where defendant had posted threat against police officer on Internet newsgroup site).

125. See *United States v. Hsu*, 155 F.3d 189, 192 (3d Cir. 1998) (involving theft of trade secrets and conspiracy to steal trade secrets under Economic Espionage Act, in which defendant allegedly sent an e-mail outlining certain core technology needed); see also *United States v. Hsu*, 40 F. Supp. 2d 623, 628 (E.D. Pa. 1999) (denying motion to dismiss based on evidence of e-mail that helped to establish that defendant charged under Economic Espionage Act knew that proprietary information was trade secret).

126. See *Jones v. Reynolds*, No. 01A01-9510-CH-00484, 1997 WL 367661, at \*2 n.7 (Tenn. Ct. App. July 2, 1997).

127. See *United States v. Tagore*, 158 F.3d 1124 (10th Cir. 1998) (affirming application of offense level enhancement for being the organizer of a criminal activity, in part on the ground that defendant used e-mail to coordinate distribution of child pornography). *But cf.* *United States v. Stevens*, 29 F. Supp. 2d 592 (D. Alaska 1998) (granting downward departure for sentencing in a child pornography case on grounds that defendant had merely requested e-mail images, many of which would qualify as child pornography, from other participants in an Internet chat room, but had not actively participated in the chat room by soliciting particular images or discussing his collection of pornography with other participants).

128. See *United States v. Ferber*, 966 F. Supp. 90, 98-99 (D. Mass. 1997).

### G. Other Cases

E-mail cases in the late 1990s involved a wide variety of other types of cases and issues that defy much synthesis. In the family law context, courts continue to recognize e-mail as an important form of communication between non-custodial parents and their children.<sup>129</sup> In deciding whether to continue an individual's involuntary commitment, another court noted evidence that plaintiff sent e-mail messages to a former classmate "that were rambling and filled with religious content and statements of conspiracy theories," one of which was "worded in an intimidating and intrusive manner."<sup>130</sup>

E-mail also surfaced in attorney disciplinary proceedings. In one such proceeding, the court noted an e-mail warning of "major league trouble" if a purported practice of switching names of attorneys working on different matters for billing purposes (thereby "giving one person credit for work performed by another") "continued and was discovered."<sup>131</sup> Another court warned that attorneys' frequent use of e-mail could result in the inadvertent disclosure of confidential information.<sup>132</sup> And yet another court reduced an attorney's fees request, finding that time spent on internal e-mail was "unproductive time."<sup>133</sup>

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129. See *McAuley v. McAuley*, No. FA 980353090S, 1999 WL 436124, at \*4 (Conn. Super. Ct. June 18, 1999) (ordering that non-custodial parent and child are to have contact via "email during reasonable hours of the day and evening"); *Issacharoff v. Issacharoff*, FA 950144149S, 1998 Conn. Super. LEXIS 3573, at \*18 (Conn. Super. Ct. Dec. 17, 1998) (child custody case in which the court granted the father unfettered e-mail access to his child through a dedicated line and computer that the father would provide); *Cohen v. Cohen*, No. FA 960386405S, 1997 WL 688774, at \*6 (Conn. Super. Ct. Oct. 27, 1997) (discussing divorce decree providing that children should have reasonable e-mail contact with non-custodial parent); *Sumra v. Sumra*, 561 N.W.2d 290, 295 (N.D. 1997) (affirming divorce decree allowing mother to move children to Wales, but noting trial court allowed unlimited e-mail communication between father and children); *Herring v. Herring*, Nos. 16567, CH99-J2117, 1999 WL 370263, at \*6 (Va. Cir. Ct. June 2, 1999) (ordering each parent to "install internet access in their home and establish an e-mail account so that [their daughter] may send and receive e-mail to and from her parent with whom she is not staying"); cf. *Czajka v. Urbanetti*, No. FA 99010418S, 1999 WL 124321, (Conn. Super. Ct. Feb. 23, 1999) (enjoining mother from harassing or threatening her three children via e-mail).

130. *In re Meyer*, No. C0-97-2341, 1998 WL 268082, at \*2 (Minn. Ct. App. May 26, 1998).

131. *In re Disciplinary Proceedings Against Dann*, 960 P.2d 416, 417 (Wash. 1998).

132. See *Conley, Lott, Nichols Mach. Co. v. Brooks*, 948 S.W.2d 345, 347-48 (Tex. App. 1997); cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99-413 (1999) (concluding that "lawyer[s] may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct," but cautioning that e-mail, like some other common forms of communication, may not be appropriate for highly sensitive communication).

133. *Thomas v. Secretary of Dep't of Health and Human Servs.*, No. 92-46V, 1997 WL 74664, at \*5 (Fed. Cl. Feb. 3, 1997); see also *Martens v. Board of Coop. Educ. Servs.*, No. 97

Another recent case involved a trespass to chattels claim in which the plaintiff company alleged that defendant sent unsolicited e-mail messages regarding plaintiff's employment practices to company employees on the company's proprietary computer system.<sup>134</sup> Defendant apparently refused the company's request to stop and "employed surreptitious means to circumvent [company's] efforts to block entry of [defendant's] messages into [company's] system."<sup>135</sup> In granting plaintiff's request for a preliminary injunction against further purported invasion of its e-mail system, the court found that defendant's unwelcome e-mail was not constitutionally protected speech.<sup>136</sup>

The remaining e-mail cases from the late 1990s arose in a variety of different contexts. In one case, a court found that a pharmacy violated state law when, "as part of a test program, [the pharmacy] accepted prescription orders from physicians via a computer electronic mail system . . ."<sup>137</sup> Another court found that a defendant was a member of the mass media for purposes of plaintiff's defamation claim (meaning that plaintiff had to show actual malice) because, among other things, defendant used e-mail to disseminate news.<sup>138</sup> In a human remains repatriation case, a court noted internal government e-mail suggesting the government had made a decision about repatriation, while publicly maintaining that it had not made such a decision.<sup>139</sup>

An individual's e-mail use was a factor in a Tax Court case.<sup>140</sup> The court examined the testimony of the taxpayer that he spent "30 to

CIV 0684(DC), 1999 WL 294801, at \*1 (S.D.N.Y. May 11, 1999) (finding attorney was discharged without cause after noting that the "record contains substantial support for plaintiff's position," including e-mail in which the attorney purportedly treated plaintiff "in a rude and obnoxious manner").

134. See *Intel Corp. v. Hamidi*, No. 98AS05067, 1999 WL 450944, at \*1 (Cal. App. Dep't Super. Ct. Apr. 28, 1999).

135. *Id.*

136. See *id.* at \*3.

137. *Walgreen Co. v. Wisconsin Pharmacy Examining Bd.*, No. 97-1513, 1998 WL 65551, at \*1 (Wis. Ct. App. Feb. 19, 1998).

138. See *Metastorm, Inc. v. Gartner Group, Inc.*, 28 F. Supp. 2d 665, 670 (D.D.C. 1998).

139. See *Bonnichsen v. United States*, 969 F. Supp. 628, 639 (D. Or. 1997); cf. *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 607 (E.D. Va. 1999) (challenging Navy's decision to locate aircraft at naval air station, plaintiff cited to "e-mail to prove that the move" was preordained; court found that "[a]t most, this lone e-mail, extracted from an administrative record of over 51,000 pages, merely demonstrates that the Navy had a preferred alternative" when it began to consider relocation alternatives).

140. *Pohoski v. Commissioner*, No. 9027-96, 1998 WL 7748 (T.C. Jan. 13, 1998) (noting time spent by taxpayer on e-mail and other Internet activity).

40 minutes per day checking his e-mail” to and from clients, as well as other time spent on web page construction, to determine whether the taxpayer “materially participated” in real estate rentals for purposes of passive loss rules.<sup>141</sup>

As these cases demonstrate, e-mail is providing probative, at times determinative, evidence in deciding a wide variety of issues. E-mail also is proving particularly useful in litigation to reflect and record communication and to memorialize events.

#### IV. THE FUTURE

The e-mail cases to date suggest that, in the future, e-mail will continue to shed light on a variety of issues in different types of disputes, often as the smoking gun that undermines or supports testimony, a claim or a defense. E-mail in litigation will continue to expand and grow in the future and such growth will be particularly significant in certain types of cases and in addressing certain types of issues.

Taken together, the pervasive use and retention of e-mail on the job, the perception that e-mail is quick and informal, and the misperception that e-mail is confidential and not permanent, suggest that e-mail will continue to be a substantial and permanent fixture in employment law disputes. As telecommuting and communication via the Internet cause the workplace to become less centralized, e-mail etiquette will become more important in the employment context. Accordingly, courts can expect to see more litigation arising out of improper communication through e-mail, failing to communicate through e-mail, failing to respond to e-mail in a timely fashion, improper volume of transmissions of e-mail, and related matters. Claims of harassment, violation of privacy, and defamation based on e-mail in the workplace also will increase. The e-mail cases that have arisen in the employment context demonstrate that e-mail can be a powerful (and at times devastating) tool to support claims or defenses. These cases also demonstrate the importance of a well reasoned, written, publicized and enforced corporate policy regarding e-mail usage and retention. Absent such a policy, e-mail will be a gold mine for disgruntled employees in bringing claims against an employer.

E-mail will frequently play a significant role in commercial disputes. E-mail will provide unique insight (and undoubtedly key admissions) in antitrust, unfair competition and contract cases. As

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141. *Id.* at \*6.



technology increasingly enables the use of e-mail to transmit pictures and video, the use of e-mail as evidence in litigation will also increase, presenting new legal issues. Litigants will continue to offer e-mail, including misdirected e-mail, to show consumer confusion. E-mail will continue to provide damning evidence where notice, statute of limitations, laches and waiver issues are at issue. E-mail prepared after disputes arise may provide a source of admissions. Moreover, e-mail may serve to cause changes in the substantive law used to resolve commercial disputes, such as the type of writing required to satisfy the statute of frauds.

In the procedural context, more and more courts will allow e-mail filing, which, in turn, may result in some near-term uncertainty about precisely when a document is filed and what sort of proof of filing will be accepted. The ability to electronically search a large number of e-mail messages, and who should bear the cost of such a search, will present ongoing threshold issues for requests for production of e-mail. Recognizing the power of e-mail, courts will more frequently manage complex, multi-party and class action litigation using e-mail in an effort to communicate information quickly and inexpensively to a large number of recipients. In the administrative procedure context, e-mail undoubtedly will continue to reveal evidence that litigants can use to suggest bias, deliberative impropriety, and related issues that may provide further assurances of proper administrative action.

Courts will continue to struggle with what level of electronic contact with a forum is required to exercise personal jurisdiction over a defendant and the standards for such minimum electronic contacts will continue to evolve. Unfortunately, even if the Supreme Court provides a definitive test to govern the inquiry, the fact-intensive nature of the minimum contacts question will continue to prompt debate, both in the courtroom and in academia.

Similarly, e-mail use in criminal cases will continue to grow. To date, much of the use of e-mail in the criminal context has involved child pornography. In the future, prosecutorial focus on e-mail will expand to include such issues as jurisdictional contacts, evidence of interstate activity, evidence to support allegations of financial crimes, and evidence of trade secret misappropriation. And in both the civil and criminal contexts, e-mail may be used in securities cases as evidence of intent, timing of actions, and the acquisition of information.

Apart from these general categories, e-mail will have an increased role in many other types of disputes. For example, in

family law disputes, e-mail will be featured more frequently, particularly in allowing access between children and non-custodial parents. As another example, defamation and invasion of privacy claims will be based more frequently on e-mail activity.

## V. CONCLUSION

E-mail in litigation will continue to grow in the future. From comparatively modest beginnings in the early-1970s, e-mail in litigation has expanded dramatically during the past two decades. There is no reason to believe that the recent expansion of e-mail cases will slow in the foreseeable future and, as the cases to date suggest, e-mail can play a role in literally any type of litigation. Although only time will tell, at present, the outer bounds of future e-mail use in litigation appear limited only by the need and creative vision of litigants and their attorneys, and the receptiveness of the courts.

